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Supreme Court, U.S.
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No. 08-194

IN THE

Supreme Court of the United States

PITT VESOM, M.D.,

Petitioner,

v.

ATCHISON HOSPITAL ASSOCIATION; RYAN THOMAS, M.D.; DOUGLAS GORACKE, M.D.; DONALD SWAYZE, D.O.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to S. Ct. R. 29.6, Respondent Atchison Hospital Association ("AHA"), a not-for-profit Kansas corporation, states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

I. Introduction

This case is not one of national importance requiring the Court's review to ensure that justice is done. It has already twice been fully briefed by the parties and carefully reviewed by the courts below. Although the Petitioner has attempted to repackage his disappointment over the outcome of the case as the basis for a third level of review, there are simply no issues present here that merit the Court's attention.

For the Court to have an accurate picture of the case and context for the challenged decision, it is necessary that the Respondents state the facts more fully in this Brief in Opposition than those included in the Petition.

II. Statement of Facts

AHA is a critical access hospital that serves the citizens of Atchison, Kansas and the surrounding area.

The physicians and dentists practicing at AHA ("Medical Staff") are organized under the AHA Medical Staff Bylaws ("Bylaws"), which "establish the mechanisms to carry out the direct and delegated responsibilities of the Medical Staff in cooperation with the Hospital Administration and the Governing Board." (Pet. App. at 3a.) The Governing Board is a "group of men and women who constitute the Board of Directors of [AHA], having the ultimate responsibility for the operation of the Hospital and for providing patient care." (*Id.*)

Under the Bylaws, the members of the Medical Staff are required to perform all necessary and appropriate "staff, committee and hospital functions" and to act in "a professional, cooperative manner with colleagues and members of the Hospital Staff." (*Id.* at 57a.) The Bylaws also contain specific provisions defining and prohibiting "disruptive" behavior by physicians. (*Id.*)

The Medical Staff elects officers to carry out certain functions on its behalf. Those officers, together with the immediate past Chief of Staff and a "member at large," make up the Medical Executive Committee ("MEC"). (*Id.* at 3a.) In 2003, at the time of the challenged action in this case, the MEC consisted of Respondents Douglas Goracke, M.D., Donald Swayze, M.D., and Ryan Thomas, M.D., along with two other physicians.

Independent and hospital-employed physicians who want to use AHA's facilities are required to have an association with the hospital through a "medical staff privilege." (*Id.*) To maintain the quality of healthcare provided at AHA, privileges are granted only for a two-year period, after which time a physician must seek reappointment. (*Id.*) No physician is entitled to membership solely because (s)he is licensed in Kansas or previously had privileges at AHA. (*Id.* at 56a-57a.) Rather, privileges are extended only to those who meet and maintain the qualifications, standards and requirements of the applicable rules and regulations.

The MEC's duties include the evaluation of new applicants and physicians applying for reappointment to the Medical Staff. Its authority, however, is expressly limited "to making recommendations to the Governing

Board." (*Id.* at 3a.) If the MEC recommends that a physician's privileges not be renewed, the Bylaws provide a procedure for challenging the action. In particular, the physician is entitled to a fair hearing before five disinterested physicians and, if dissatisfied with the result, a subsequent appeal to the Governing Board, which has the "ultimate authority" to decide who will have Medical Staff privileges.

The Petitioner, Pitt Vesom, M.D. ("Dr. Vesom"), is a foreign-born male physician, who was first granted privileges at AHA in 1983. (*Id.* at 5a.) Following his initial appointment, Dr. Vesom maintained Medical Staff privileges at AHA until June, 1996, when he voluntarily resigned and sold his medical practice to move to Thailand. (*Id.*)

In 1998, Dr. Vesom returned to Atchison, Kansas and requested reappointment to AHA's Medical Staff. (*Id.* at 62a.) At that time, the MEC recommended against privileges, but the Governing Board chose not to follow the recommendation and instead offered Dr. Vesom a conditional reappointment upon his approval of an Agreement and Release ("Agreement"). (*Id.*) The Agreement granted Dr. Vesom privileges beginning on March 4, 1999, with a one-year provisional status, and provided for proctoring, written reports of his behavior and restrictions on his ability to be alone with any female employee or patient at AHA. (*Id.* at 62a-63a.) In addition, the Agreement contained a provision reflecting a concern that Dr. Vesom might engage in future disruptive behavior. (*Id.* at 6a.)

Dr. Vesom's next reappointment request in 2001 was approved, and he was granted privileges for the following two years. (*Id.* at 64a.) Thereafter, in December, 2002, Dr. Vesom submitted paperwork to AHA for the 2003 reapplication process. (*Id.* at 6a.)

Before the MEC met to consider this application, Dr. Vesom and two other physicians, a white male and a foreign-born male, made complaints regarding AHA's peer review process. Specifically, on January 3, 2003, the three physicians had a meeting with AHA personnel, including the hospital's CEO, regarding their complaints. (*Id.* at 7a.) The physicians later documented those complaints in a January 22, 2003, letter to the Governing Board that they each signed. (*Id.*)

In February, 2003, the MEC reviewed Dr. Vesom's application and the records from his "credentials file" at AHA. On February 18, 2003, the MEC met and formally determined that it would recommend that Dr. Vesom's Medical Staff privileges not be renewed. (*Id.* at 8a.) The MEC concluded that Dr. Vesom had violated the "Disruptive Behavior" provisions of the Bylaws and had failed to properly discharge his responsibilities for AHA staff, committee and hospital functions.

At the same time, the MEC determined that it would also recommend to the Governing Board that AHA terminate the privileges of the white male physician who made complaints. (*Id.*) The other foreign-born male physician who complained about the peer review process at the hospital has sought and been granted Medical Staff privileges at each required reappointment interval since making those complaints. (*Id.* at 91a.) In fact, for

the 2005 Medical Staff year, he served as the member at large on the MEC. (*Id.* at 7a.)

On February 18, 2003, AHA sent Dr. Vesom and the white male physician identical letters advising them of the MEC's adverse recommendations. (*Id.* at 9a.) The reasons for the adverse recommendations included "verbal attacks on individuals and AHA personnel that were personal, irrelevant, and went beyond the bounds of fair professional conduct," "impertinent and inappropriate comments in official documents, including the impugning of the quality of care in AHA," "non-constructive criticism addressed to recipients in such a way as to intimidate, undermine confidence, belittle, or imply stupidity or incompetence" and "verbal threats of retribution and litigation towards individuals and AHA personnel including members of the Medical Staff." (Aplt. App. V.2 at 686-87.)

Thereafter, on March 6, 2003, Dr. Vesom requested a fair hearing before five independent physicians. As provided in the Bylaws, Dr. Vesom was given an opportunity to object to the members of the Fair Hearing Committee. After objecting to the composition of the first panel proposed, he ultimately approved the physicians that heard the appeal. (Pet. App. at 68a-69a.) Both AHA and Dr. Vesom were represented by counsel at the hearing and permitted to offer evidence and argument in support of their positions. The members of the Fair Hearing Committee were also allowed to ask their own questions.

The Fair Hearing Committee, with all but one member coming from communities outside of Atchison, Kansas, concluded that the MEC's recommendation of non-reappointment was justified. (*Id.* at 69a.) The Committee Chair prepared a written report detailing the Committee's unanimous decision, finding that Dr. Vesom had "an established pattern of disruptive behavior that created a poor environment for hospital personnel, medical staff, patients and his physician colleagues as he was warned on multiple occasions that this was in direct violation of the Medical Staff Bylaws." (*Id.*) Three other members of the Fair Hearing Committee issued separate reports with similar findings and criticisms about Dr. Vesom's disruptive behavior.

On February 11, 2004, Dr. Vesom requested "de novo" appellate review to the Governing Board, which ultimately voted not to reappoint him to the Medical Staff. (*Id.* at 10a.) Its decision became effective on April 2, 2004.[1]

III. Proceedings and Disposition Below

Following the Governing Board's decision, Dr. Vesom filed suit against AHA and Drs. Goracke, Swayze, and Thomas alleging, among other things, that he had been discriminated against on the basis of race in violation of 42 U.S.C. § 1981 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

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1. During the approximately fourteen months that he pursued his appeal of the MEC's recommendation, Dr. Vesom maintained Medical Staff privileges at AHA. (Pet. App. at 10a.)

The district court determined that summary judgment on those claims was appropriate because "'the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or . . . the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.'" (Pet. App. at 91a (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)).) The district court held that although Dr. Vesom had presented evidence that the MEC decided not to recommend reappointment before actually discussing the grounds for doing so, he had failed "to create a question of fact for the jury that *race* motivated [the decision]." (*Id.* at 86a (citation omitted).) The district court found that, to the contrary, Dr. Vesom's own evidence suggested that the decision was the result of his "active disagreement with members of the MEC regarding the handling of certain peer review cases" and his "complaints about the peer review process at AHA." (*Id.* at 85a-86a.) The district court noted, "The fact that [another foreign born physician] did not suffer from a denial of medical staff privilege reappointment belies plaintiff's conclusory allegations that the MEC declined to renew his privileges based on race." (*Id.* at 91a.)

The United States Court of Appeals for the Tenth Circuit affirmed the district court's ruling, concluding that Dr. Vesom had "failed to submit any admissible evidence of racial discrimination." (*Id.* at 28a.) It held that Dr. Vesom had not demonstrated that the MEC was both motivated by race and principally responsible for AHA's decision not to reappoint him to the Medical Staff, as was the case in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.

133 (2000), the authority central to Dr. Vesom's case. (*Id.* at 26a.) The Tenth Circuit noted, "[T]he only evidence of the MEC's motivations reveals an ongoing and escalating animosity between the independent physicians (including Dr. Vesom) and physicians employed by the Hospital." (*Id.* at 28a.) It also pointed out that the MEC had decided to recommend against renewing the Medical Staff privileges of a white male physician for identical reasons. (*Id.*)

REASONS FOR DENYING THE PETITION

Dr. Vesom has presented no "compelling reasons" for the Court to grant his Petition, instead offering only unsupported and strained arguments that the thorough and well-reasoned decision below requires "an exercise of this Court's supervisory power." S. Ct. R. 10(a). However, there has been no departure "from the accepted and usual course of judicial proceedings" that would support, much less "call for," any action here to ensure the proper functioning of the federal judiciary. *Id.* This is not a case involving important or difficult questions that demand review, as demonstrated by Dr. Vesom's failure to identify any conflict among the circuits. Accordingly, the Court should deny the Petition.

I. The Tenth Circuit's Decision that Dr. Vesom Failed to Establish Pretext Does Not Conflict with the Standard in *Reeves*.

The Tenth Circuit's decision in this case is squarely in keeping with the law as stated in *Reeves*. Indeed, in ruling on Dr. Vesom's discrimination claims, the Tenth Circuit cited *Reeves* and directly followed *Swackhammer*

v. Sprint/United Mgmt. Co., 493 F.3d 1160, 1168 (10th Cir. 2007), which adheres to the holding of *Reeves* and definitively rejects a "pretext plus" standard that would require plaintiffs to present additional, independent evidence of discrimination to prove their claims.

In *Reeves*, this Court confirmed that in cases where a plaintiff is attempting to prove intentional discrimination through indirect evidence, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." 530 U.S. at 147 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)). Even so, the Court also made clear that "the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff." *Id.* at 146 (citing *St. Mary's Honor Ctr.*, 509 U.S. at 511). In particular, the Court explained:

> The ultimate question is whether the employer intentionally discriminated, and proof that the "employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." In other words, "[i]t is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."

Id. at 147 (citing *St. Mary's Honor Ctr.*, 509 U.S. at 519, 524). With that in mind, the Court stated:

> Certainly there will be instances where, although the plaintiff has established a prima

> facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. at 148 (citations omitted).

The Court in *Reeves* further stated that whether judgment as a matter of law was appropriate in any particular case would depend on a number of factors, including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's stated reason is false, and any other evidence that supports the employer's case." *Id.* at 148-49. Importantly, in view of the principles stated above, the Court then held that the court below had "erred in proceeding from the premise that a plaintiff must *always* introduce additional, independent evidence of discrimination." *Id.* at 149 (emphasis added).

The Tenth Circuit did not ignore *Reeves* in ruling on Dr. Vesom's discrimination claims. In fact, the analysis the Tenth Circuit applied in determining that Dr. Vesom had failed to establish pretext and make a submissible case of racial discrimination is entirely consistent with *Reeves*.

To survive summary judgment, Dr. Vesom was required to show that AHA's reason for the non-renewal of his Medical Staff privileges was a pretext for *discrimination*. As set forth in *Reeves*, in "appropriate circumstances," this burden can be met through an inference arising from evidence showing the falsity of an employer's explanation for the challenged action. *Id.* at 147. However, such an inference is not always permissible.

In considering Dr. Vesom's claims, the Tenth Circuit determined that he had failed to establish that AHA's proffered reason for its decision was a pretext for discrimination. In particular, the court noted—three separate times—that Dr. Vesom had failed to come forward with *any* evidence of racial discrimination. It further noted that other, nondiscriminatory motives were shown by the record, pointing out that a white male physician who had complained about AHA's peer review process at the same time as Dr. Vesom was similarly denied Medical Staff privileges at the hospital. In addition, the court reasoned that Dr. Vesom had failed to establish any connection between the MEC, which allegedly made a post hoc decision that he was a disruptive physician, and the Governing Board, which made the final decision not to renew his privileges after five independent and disinterested physicians determined that Dr. Vesom was, in fact, disruptive.

The Tenth Circuit's ruling that Dr. Vesom failed to demonstrate pretext is wholly in line with *Reeves*, which recognizes that there will be cases where "no rational factfinder could conclude that the challenged action was discriminatory" despite the plaintiff's prima facie case

and evidence to rebut the defendant's explanation for the action. *Id.* at 148. In so ruling, the court did not return to the "pretext plus" standard rejected by the Court in *Reeves* or impose an additional or improper burden that a plaintiff attempting to prove intentional discrimination through indirect evidence must disprove all possible nondiscriminatory reasons for the employer's adverse decision. Rather, under the facts, it determined that in the absence of *any* evidence of racial discrimination, with only weak proof of a post hoc justification and abundant uncontroverted evidence that no discrimination occurred, Dr. Vesom had failed to make a submissible case.

Dr. Vesom's challenge to the Tenth Circuit's decision is nothing more than an attempt to create issues where none exist to obtain a third review of his claims. He has cited no split of authority, and his argument that there has been such a departure from the normal course of judicial proceedings so as to warrant an exercise of the Court's supervisory power, misconstrues the applicable law and, like his claims, is utterly lacking in support. Indeed, decisions from other circuits establish that they are applying *Reeves* just as the Tenth Circuit did here. *See, e.g., Skelton v. Sara Lee Corp.*, 249 Fed. Appx. 450, 461 (6th Cir. 2007) ("Even if this Court assumes that Defendant made the decision to eliminate Skelton prior to the interviews, it does not necessarily follow, or even suggest, that Defendant targeted Skelton because of his age."), *cert. denied*, 128 S. Ct. 1873 (2008); *Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 342 (5th Cir. 2002) (affirming summary judgment because the plaintiff had failed "to create a question of fact for the jury that race motivated [the employer's adverse

decision]"), *cert. denied*, 537 U.S. 1108 (2003). There is simply no basis for the Court to perform any "error-correcting function" to ensure that *Reeves* is being followed. *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting).

At best, Dr. Vesom's argument is a dressed-up complaint that the Tenth Circuit misapplied a properly stated rule of law. Such grounds, though, do not support an exercise of the Court's jurisdiction in this case. S. Ct. R. 10. Dr. Vesom's claims have twice been carefully considered by the courts below and do not merit any further attention by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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